HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Arbitration Case No.: 52 of 2003
Reserved on: 20.7.2007
Decided on: 24.8.2007

Satlut Jal Vidyut Nigam Ltd. ……Petitioner/Objector.

Versus

M/s Hythro Power Corporation Ltd. ……Claimant/Non-objector.

Coram:

The Hon'ble Mr.Justice V.K. Ahuja, Judge.

Whether approved for reporting? Yes.

For the petitioner/objector: Mr.Ramakant Sharma, Advocate.

For the claimant/Non-objector: Mr.Suneet Goel, Advocate.

V.K. Ahuja, J:

This Judgment shall dispose of the objections filed under Section 34 of Arbitration and Conciliation Act, 1996, by the petitioner/objector against the award passed by Shri O.P. Mahajan, Arbitrator, on 11th March, 2003 as well as on 3rd April, 2003.

Briefly stated the facts of the case are that the claimant was awarded contract in respect of construction of non-family accommodation – B, C and D at Jhakri, District Shimla, H.P. (PCD-54). An agreement was signed in between the

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1. Whether reporters of Local papers may be allowed to see the judgment? Yes.

parties and after completion of the work, certain disputes had arisen which were referred to the sole arbitration of Shri O.P. Mahajan. The Arbitrator entered into reference, called upon the parties to file claim as well as counter claim. Respondent submitted as many as 12 claims, whereas objector had raised a counter claim of Rs.25.00 lacs with interest at the rate of 18%. The Arbitrator, after hearing the parties, passed an award on 11.3.2003. Thereafter, the Arbitrator suo motu exercising powers under Section 33(3) of the Arbitration and Conciliation Act by way of clarification dated 3.4.2003 ordered that the excess payments, if any, released to the claimant for the deviated items of work at rate higher than the contract rates for the quantities beyond 20% DL (deviated limit) shall be deducted from the amount of the award for claim No.3.

The objector had challenged the impugned award passed by the Arbitrator on the following grounds:

(a) That the impugned award is against the provisions of the Act as well as against the agreement entered into in between the parties.

(b) The award in respect of claim No.3 deserves to be quashed and set aside on the ground that the Arbitrator had not taken into consideration the provisions of clause 12(i) to 12(iv) wherein it was agreed in between the parties that in case of deviation beyond 20%, the Contractor was entitled for the rates of HPSR of 1987, except foundation. However, the Arbitrator had given the rates to the claimant without any analysis. The Arbitrator had awarded overhead and profit claims to the extent of 20%, whereas it was permissible to the extent of 15% under HPSR to which the Contractor had agreed in the agreement itself.

(c) The award deserves to be set aside on the ground that the Arbitrator has allowed interest at the rate of 17% which is

against the provisions of clause 43 of the arbitration agreement, which provides that even in case of advance payment, rate of interest agreed was 12%. Otherwise also, the interest cannot be awarded beyond the prevalent bank rate, which, in no case, was beyond 12%, as provided in the agreement also.

(d) The Arbitrator had wrongly decided claim No.5 and had awarded amount with respect to 5 kilometres of lead whereas respondent himself had asked for award to the tune of balance payment of 2 kilometres lead. The Contractor was never asked to dispose of the excavated earth beyond 3 kilometres. Therefore, the Contractor was not entitled to any amount.

(e) The award qua claims No.7 and 9 is also liable to be quashed and set aside on the ground that as per the concept of measurements, quantity or cutting cannot be re-assessed after lapse of considerable period due to change of material profile and surface. The cuttings of excavation were carried out somewhere in 1994 and measured in 2001-02.

(f) That the award pertaining to claim No.2 part-II regarding refund of liquidated damages to the tune of Rs.1,95,321/- has been wrongly awarded by the Arbitrator by way of refund to the Contractor when this was a penalty imposed by the objector under clause 2, which was not referred to for arbitration. The award was also challenged being against basic principles of law and principles of natural justice and against public policy of India.

Reply to the objections were filed by the respondent who disputed the objections raised by the objector as detailed above.

On the pleadings of the parties, the issues were framed as under:

1. Whether the award made by the Arbitrator is against the provisions of the contract agreement? OPP

2. Whether clause 2 of the contract Agreement, pursuant to which the Award was made, is not arbitrable? OPP

Written arguments were filed by both the parties. I have gone through the record of the case as well as the award made by the Arbitrator. My findings on these issues are as under:

Issue No.1:

Coming to the individual objections raised by the objector to the various claims, I will briefly take up all the objections to the claims as made out by the objector in the objection petition.

In regard to claim No.3, it has been alleged by the objector that it was agreed to in between the parties that in case of deviation beyond 20%, the Contractor shall be entitled for the rates of HPSR of 1987, except foundation, whereas the Arbitrator has given the rates to the claimant without any analysis. It was also urged by the learned counsel for the objector that the Arbitrator has awarded overhead and profits to the extent of 20% whereas it was permissible only to the extent of 15% under HPSR to which the Contractor had agreed. Coming to the reasoning given by the Arbitrator, it is clear that the Arbitrator had referred to clause 12-A of the contract agreement vide which prevalent market rates were to be paid for the quantities of work done beyond 20% deviation limits. The Contractor had claimed market rates not only for the deviated quantities beyond 20% but also claimed compensation for all those items on which the executed quantity of work was below 20% of the quantities of the

contract or on which no work was done at all. The Arbitrator had considered this claim of the objector as well as the plea of the respondent that he had already paid the market rate for the deviated items as per the provisions of clause 12-A of the contract. On consideration of the various provisions of the arbitration agreement as well the pleas raised by both the parties, the Arbitrator had considered it reasonable to consider OHP at the rate of 20% in the analysis of the rates given by the claimant and had concluded that a sum of Rs.17.08 lacs becomes payable to the claimant. However, in regard to the items which are executed below 20% of the deviation limit after referring to the clauses of the agreement, this plea was not accepted.

Coming to the next claim in regard to claim No.5, the claimant had claimed that the payable rates are to be arrived at according to the provisions of HPSR. It was not disputed by the claimant, as per the award itself, that in case of most of the items, the respondent had paid the rates accordingly. The respondent admitted that a few extra and substituted items were got executed from the claimant for which he was duly paid. The Arbitrator had considered the pleas of both the parties and it was observed that the respondent had neither turned down market rates claimed by the claimant nor he did intimate the rates, which according to him, was the reasonable market rates and, therefore, the claim of the claimant for Rs.13,48,254/- was found not justified and he was awarded a sum of Rs.19,100/- only in regard to part-I of the claim, whereas in regard to part-II of the claim, a sum of Rs.2.87 lacs was awarded against the claim of Rs.29,06,694/-.

Coming to the third objection in regard to claim No.7, a claim of Rs.1,97,387/- pertains to the unpaid quantity of earth work stated to have been

carried out by the claimant. The joint measurements were taken of the earth work and accordingly, against claim of Rs.1,97,387/-, a sum of Rs.1.77 lacs was awarded.

Coming to claim No.8, the claimant had claimed damages for a sum of Rs.1,93,439/- and had also claimed interest at the rate of 24% and accordingly, the Arbitrator awarded simple interest on a sum of Rs.1.77 lacs at the rate of 17% from 1.6.1997 till 31.5.2001 and thereafter 12% from 1.6.2001 till the date on which a sum of Rs.1.77 lacs was released to the claimant.

Coming to the claim No.9 for Rs.9,85,306/- on account of quantity of excavation of block-B, for which the claimant claimed that joint measurements of the work was not taken by the respondent. The respondent had allegedly failed to take joint measurements and after referring to the claims of both the parties, a sum of Rs.4.02 lacs was awarded under claim No.9.

Claim No.2 pertains to liquidated damages and a sum of Rs.5,93,336/- was claimed on account of the damages/interest at the rate of 24%. Accordingly, after referring to the claims of the parties, the Arbitrator had awarded simple interest on 3.64 lacs at the rate of 17% for the periods specified therein and 12% upto the date of payment of this award. Thereafter, interest at the rate of 17% was allowed on the amount upto the time this payment was released to the claimant.

I have referred to the individual claims and the submissions of both the parties as well as findings of the Arbitrator to show that the Arbitrator had given consideration to the pleas raised by both the parties and after referring to the terms of the agreement had given his findings alongwith reasonings. However, in so far as the award of interest is concerned under various claims, as

mentioned above, it is clear that there is no specific reference to the terms of agreement in this regard. A perusal of clause 43 of the agreement shows that the advance shall bear simple interest at the rate of 12% per annum. The Arbitrator has not specifically referred to any clause or provision vide which the interest was awarded by him at the rate exceeding 12% and the reasoning given for the award of interest beyond 10%.

I may make a reference to the decisions relied upon by the learned counsel for the objector.

The decision in **Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra Reddy and another, (2007) 2 Supreme Court Cases 720**, shows that their Lordships had referred to the provisions of Section 31(7) of Arbitration and Conciliation Act, 1996 and in that case, the Arbitrator had awarded interest at the rate of 18% for pre-arbitration period, for pendent lite period and future interest. It was held that it should be reduced to 9% in view of the substantial reduction of interest rate after economic reforms in the country.

The decision in **Sudam Ganpat Kutwal v. Shevantabai Tukaram Gulumkar, (2006) 7 Supreme Court Cases 200,** was also relied upon but that decision is not under the Arbitration Act but deals with a case pertaining to Bombay Tenancy and Agricultural Lands Act, 1948 and, therefore, is not applicable to the present facts.

The decision in **Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd., AIR 2005 Supreme Court 2071**, was also relied upon in which the Apex Court has referred to the provisions of Section 31 of Arbitration and Conciliation Act and had considered the question of amount of interest. In that case, the interest was awarded at the rate of 18% for pre-reference, pendent lite and post award

period. It was observed that the arbitration agreement did not provide for payment of interest. Section 34 of CPC also had no application to arbitration proceedings. However, it was within the power of Arbitrator to award interest for all three stages. It was held that an award deserves no interference and it was also held that the High Court was not right in reducing the rate of interest to 6% and the award was restored.

A reference can be made to the provisions of Section 31(7) of Arbitration and Conciliation Act, 1996, which makes a provision in regard to payment of interest at such rate as it deems reasonable on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

Applying the dictum of law laid down in Krishna Bhagya Jala Nigam Ltd. case (supra), it is clear that the interest awarded by the Arbitrator can be reduced by the court and that appears to be proper course to be adopted rather than setting aside the award and remitting the case to the Arbitrator for his decision afresh. However, in that case the interest was reduced to 9% keeping in view the prevalent rate of interest but in the present case, there is a specific provision, as mentioned above, for grant of interest at the rate of 12% and I accordingly hold that the award passed by the Arbitrator deserves to be modified to this extent that the award of interest beyond 12% cannot be said to be proper for different stages and different periods as mentioned in the award and the interest shall be payable only at the rate of 12% as provided in the agreement.

From the above discussion, it is clear that the award made by the Arbitrator is liable to be affirmed, except in regard to interest which was awarded

beyond 12%, which deserves to be reduced to 12%, as detailed above. Accordingly issue No.1 is partly decided in favour of the objector.

Issue No.2:

No arguments were advanced under this issue as to how the award is not arbitrable and as such this issue is decided as against the objector and in favour of the respondent.

In view of my findings on issue No.1 partly being in favour of the objector, the award is modified in regard to the interest, as detailed above. The award made by the Arbitrator on 11.3.2003 and 3.4.2003 is accordingly liable to be confirmed, subject to above modification. Parties are left to bear their own costs.

August 24, 2007. **(V.K. Ahuja), J.**
(trs)